Duquesne Law Review

Volume 14 | Number 1 Article 15

1975

Environmental Law - Clean Air Act Amendments - State Implementation Plans - Postponements - Revisions

John Anthony Fries

ENVIRONMENTAL LAW—CLEAN AIR ACT AMENDMENTS—STATE IMPLEMENTATION PLANS—POSTPONEMENTS—REVISIONS—The United States Supreme Court has held that individual variances from a state's implementation plan which do not violate national ambient air standards are permissible as "revisions," rather than "postponements," under the Clean Air Act Amendments of 1970.

Train v. Natural Resources Defense Council, Inc., 421 U.S. 60 (1975).

In response to heightened public concern over the quality of ambient air[1] in the 1960's, Congress passed a series of laws designed to stimulate promulgation and enforcement of air quality standards.[2] The first acts placed primary responsibility for air quality control upon the states: they were given wide discretion on how and when to act and the role of the federal government was severely limited.[3] Most states failed to exercise their discretion, forcing stronger federal legislation which demanded certain state action in the field of air pollution control. The Clean Air Act Amendments of 1970[4] called for formulation of national ambient air quality standards[5] by the Environmental Protection Agency (EPA). The states were obliged to submit plans for the implementation of these standards within

1. "Ambient air" is the statutory term used to describe the air which surrounds us. *See* 42 U.S.C. § 1857c-4 (1970); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 66 (unabr. ed. 1966).

2. Act of July 14, 1955, ch. 360, 69 Stat. 322, *as amended* 42 U.S.C. §§ 1857, a, b, c, d, e, f (1970) authorized the Surgeon General to study the problem and to provide technical assistance to the states. The Clean Air Act of 1963, Pub. L. No. 88-206, 77 Stat. 392, *as amended* 42 U.S.C. § 1857d (1970) authorized federal authorities to intervene directly to abate interstate pollution in certain circumstances. The Clean Air Act Amendments of 1965, Pub. L. No. 89-272, § 103, 79 Stat. 996, *as amended* 42 U.S.C. § 1857b (1970) and Clean Air Act Amendments of 1966, Pub. L. No. 89-675, 80 Stat. 954, *as amended* 42 U.S.C. § 1857c(a) (1970) somewhat broadened federal authority. The Air Quality Act of 1967, Pub. L. No. 90-148, 81 Stat. 485, *as amended* 42 U.S.C. §§ 1857-57*l* (1970) gave federal authorities certain enforcement and supervision powers.

3. *See, e.g.*, Air Quality Act of 1967, Pub. L. No. 90-148, 81 Stat. 485, *as amended* 42 U.S.C. §§ 1857-57*l* (1970).

4. Clean Air Act Amendments of 1970, 42 U.S.C. §§ 1857-57h (1970) [hereinafter referred to as the Amendments].

5. *Id.* § 1857c-4(a)(1). "Primary standards" are those requisite to protect the public health. *Id.* § 1857c-4(b)(1). "Secondary standards" are those "requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such pollutant in the ambient air." *Id.* § 1857c-4(b)(2). Primary standards must be obtained "as expeditiously as practicable but . . . in no case later than three years from the date of approval of [an implementation] plan." *Id.* § 1857c-5(a)(2)(A)(i). Secondary standards must be obtained within a "reasonable time." *Id.* § 1857c-5(a)(2)(A)(ii).

nine months of their promulgation.[6]

In its plan for attainment of the national standards, the state of Georgia provided for enforcement of its emissions limitations prior to the final attainment date set by the Amendments.[7] To temper this rigid requirement, the Georgia plan contained a "variance" procedure[8] whereby the state agency could exempt an individual emissions source from the plan's generally applicable requirements if strict compliance would be unreasonable, unduly burdensome or impractical.[9] The EPA approved the Georgia plan because the

6. The Amendments' overall scheme is two-tiered. After the EPA promulgated the national air quality standards, each state adopted an implementation plan tailored to its special needs and containing compliance schedules, timetables and the stringent emissions limitations necessary to comply with the national standards. Under this system, an individual source complies with the particular emissions limitations set by the state rather than with the national standards themselves. Violation of the emissions standards renders a source subject to legal action by the state agency. *Id.* § 1857c-5(a).

The Amendments' strength lies in provisions imposing stringent deadlines for the attainment of national ambient air quality standards. The Amendments require EPA approval of a state implementation plan if, *inter alia*, it provides for attainment of national primary standards as expeditiously as practicable—but in no case may attainment be later than three years from the date of the EPA's approval of the plan. *See* note 5 *supra*. The Amendments empower the EPA to formulate an implementation plan on a state's behalf if it neglects to do so or fails to plan adequately for the attainment of national standards. 42 U.S.C. § 1857c-5(c) (1970). *See, e.g.*, Texas v. EPA, 499 F.2d 289 (5th Cir. 1974), *petition for cert. filed sub nom.*, Exxon Corp. v. EPA, 44 U.S.L.W. 3153 (U.S. Aug. 30, 1975) (No. 324).

7. The Amendments do not require compliance with the national standards until the mandatory attainment date, which in most states was July, 1975; there are no statutory guidelines as to a state's application of emissions limitations prior to that date. Generally, the states either completely forgo enforcement of emissions limitations before the attainment date or they impose the limitations as soon as their plans have been approved. The EPA prefers the latter approach, although it creates a problem for some sources which may be unable to comply with the limitations immediately despite good faith efforts. Under very limited circumstances, the Amendments aid such good faith violators by allowing one-year "postponements" of any requirement of a state implementation plan. A postponement may be granted only to a source whose continued operation is essential to national security or the public welfare, and whose good faith attempt to comply has failed due to unavailable technology. 42 U.S.C. § 1857c-5(f) (1970). In addition, the Amendments require EPA approval of a "revision" of a plan, provided the plan still complies with the statutory requirements. *Id.* § 1857c-5(a)(3).

8. The term "variance" does not appear in the Amendments. Many state plans use the word, usually in reference to a change in emissions limitations mix.

9. The Georgia Act provided in part:

> The department may grant specific or general classes of variances from the particular requirements of any rule . . . because of special circumstances which would render strict compliance unreasonable, unduly burdensome, or impractical . . . .

GA. CODE ANN. § 88-912 (1971).

agency's interpretative regulation[10] on the "revision" section[11] permitted the revision of a state plan provided the plan would still meet the national standards.[12]

The Natural Resources Defense Council (NRDC), an environmental organization, sought judicial review of the agency's decision in the Court of Appeals for the Fifth Circuit.[13] The issue was whether individual variances should be treated as "revisions" or "postponements" under the Amendments. NRDC contended that individual variances might be approved only if they met the stringent conditions governing postponements.[14] The court agreed and ordered the agency to disapprove the Georgia plan, holding that the postponement section was the exclusive method by which a state could grant individual variances.[15]

In the court's view, a variance granted to an individual emissions source could not be classified as a revision, which would be a change in a generally applicable requirement; rather, the variance would be a postponement—a change in the application of a requirement to a particular party.[16] There was no room in this analysis for the agency's contention that the real distinction between "postponement" and "revision" depended on whether the variance would affect attainment of a national standard.[17]

The court thought the legislative strategy behind the Amendments precluded state-supplied pre-attainment flexibility in the form of variances. The Amendments required ambitious commitments which should not be altered once a state's plan had been approved. The three-year time limit on compliance was evidence that Congress did not expect immediate attainment of air quality standards; it was not, however, a dispensation to individual sources from immediate compliance with the emissions limitations as they

10. An interpretative regulation is an agency's construction of statutory language. In most circumstances it does not have the force of law. K. DAVIS, ADMINISTRATIVE LAW TEXT § 5.03 (3d ed. 1972).

11. 42 U.S.C. § 1857c-5(a)(2),(3) (1970).

12. 40 C.F.R. § 51.32(f) (1974).

13. Natural Resources Defense Council, Inc., v. EPA, 489 F.2d 390 (5th Cir. 1974).

14. 42 U.S.C. § 1857c-5(f) (1970). *See* note 7 *supra*.

15. 489 F.2d at 401-03. The requirements of the Georgia plan were far less stringent and therefore did not comply with the Amendments.

16. *Id.*

17. *Id.* The EPA's position was based on its own interpretation of the revision section. *See* text at notes 10-12 *supra*.

fell due under a state plan.[18] The EPA appealed this interpretation of the postponement and revision sections to the Supreme Court.[19]

The Court began its analysis of the legislation by inquiring whether Congress intended the states to retain their former significant control over the manner in which they were to achieve and maintain national standards. The Court was easily satisfied that the Amendments gave the states primary responsibility for determining and enforcing the specific source-by-source emissions limitations within their borders,[20] and that the revision section was the device to be used by the states in developing such policy choices.[21] The postponement section was a safety valve by which the EPA could grant exceptions to the national standards themselves, rather than a means by which the agency should monitor state emissions limitations. The Court concluded "that the Agency's interpretation was 'correct,' to the extent . . . that any particular interpretation of a complex statute . . . is the 'correct' one."[22] Since the EPA had been

18. 489 F.2d at 403.

19. Train v. Natural Resources Defense Council, Inc., 421 U.S. 60 (1975). The Court's opinion was written by Justice Rehnquist; Justice Douglas dissented without opinion. Justice Powell took no part in the consideration of the case.

20. *Id.* at 79.

21. *Id.* The fact the EPA must approve any revision of an implementation plan, provided it meets the requirements of the Amendments, 42 U.S.C. § 1857c-5(a)(3) (1970), gives the states leeway in enforcing the source-by-source limitations and determining the mix of pollutants within the bounds of the national standards. 421 U.S. at 79.

22. 421 U.S. at 87. The Supreme Court discussed the divergent results reached by the circuit courts that had considered the problem presented in *Train*. The First Circuit had held that Congress intended the postponement provision as the sole mechanism for relief from the national standards after the mandatory attainment date. Natural Resources Defense Council, Inc. v. EPA, 478 F.2d 875 (1st Cir. 1973). A state could, however, grant variances during the pre-attainment period. Although the statute did not specifically so provide, the court believed the Amendments anticipated greater flexibility during pre-attainment, since initially a source might be unable to meet the state's emissions limitations. *Id.* at 887. This reasoning was followed by the Second and Eighth Circuits. Natural Resources Defense Council, Inc. v. EPA, 494 F.2d 519 (2d Cir. 1974); Natural Resources Defense Council, Inc. v. EPA, 483 F.2d 690 (8th Cir. 1973).

The Ninth Circuit agreed that flexibility was necessary, not only in the pre-attainment period but during post-attainment as well. Natural Resources Defense Council, Inc. v. EPA, 507 F.2d 905 (9th Cir. 1974). The court saw evidence in the legislative history that the postponement section should apply only in cases where a particular variance would prevent attainment or maintenance of a national standard. *Id.* at 912. Yet the opinion went on to say that the EPA's revision authority was not the proper basis for allowance of state variance procedures. The court upheld the variance provisions nonetheless because, as the First Circuit had suggested, a proper interpretation of the Amendments included an element of flexibility. *Id.* at 915 n.17.

charged with the administration of the statute,[23] the court of appeals should have deferred to the agency's reasonable interpretation.[24] In support of its position, the Court looked to the legislative history, internal logic and language of the statutory provisions.

A review of the legislative history[25] revealed that the proposed Senate version of the current postponement section delayed expiration of the period for attainment of ambient air quality established by the national standards.[26] The Court believed this earlier draft allowed relief from the imposition of the national standards themselves, particularly in light of the Conference Committee report[27] which explained that further modification of the Senate proposal affected the method of granting deferrals[28] but did not make the postponement mechanism the exclusive variance procedure. The Court concluded that the postponement section, like its predecessor, referred only to relief from imposition of the national standards.[29]

A holding that variances could be permitted only as postponements would contradict the logical scheme the Court perceived in the Amendments. In addition to the provisions for postponements and revisions, the statute empowered the Administrator to grant a two-year "extension" of the period for attainment of national standards on a showing of need substantially less than required for a one-year postponement.[30] The Court reasoned that if the postponement section were the sole means of granting a variance, it would be easier for a state to delay attainment of the national standards than to effect a change in an emissions limitations mix which did not interfere with attainment of the standards themselves. The

23. 42 U.S.C. §§ 1857g(a)-h(a) (1970).

24. Udall v. Tallman, 380 U.S. 1 (1965) (when an agency is charged with administration of a statute, the Court will give great deference to the agency's interpretation of the statute); McLaren v. Fleischer, 256 U.S. 477 (1921) (agency's practical and consistent construction of a statute fairly susceptible of different meanings will not be disturbed except for compelling reasons).

25. 421 U.S. at 75-87.

26. The earlier draft of the postponement section permitted the governor of a state to petition a three-judge panel in federal district court for relief from the effects of expiration of the attainment period. S. 4358, 91st Cong., 2d Sess. § 111 (f) (1970).

27. H.R. REP. No. 91-1783, 91st Cong. 2d Sess. 45 (1970).

28. The Senate version was modified by the Conference Committee to permit extensions by the Administrator rather than by a three-judge federal district court. *Id.*

29. 421 U.S. at 84.

30. 42 U.S.C. § 1857c-5(e) (1970).

Court resolved the apparent disparity by determining the two-year extension could be conferred only once and only during the pre-attainment period, while a postponement would be availabile anytime the applicable requirements were met.[31] A comparison of these two sections supported the proposition that the postponement section was not the sole means by which individual variances might be granted.

Like the court of appeals, the Supreme Court examined the plain language of the statute. The Court disagreed, however, with the lower court's characterization of revisions and postponements.[32] In the Court's view, a "revision" would change an applicable requirement; a "postponement" would delay the applicability of the requirement without changing its substance.[33] In any event, the temptation to engage in abstract semantics detracted from the more relevant inquiry into the actual effect of the proposed variance. Compliance with the national standards was the touchstone for determining whether the postponement section applied; if a proposed emissions variance would interfere with attainment or maintenance of a national standard, it could be granted only as a postponement.[34]

Train is significant not only as the first Supreme Court case dealing with the Clean Air Act Amendments, but also as an indicator of the Court's posture in future cases concerning the Amendments. The *Train* decision raises several questions which will, no doubt, culminate in further argument before the Court. One obvious con-

31. The Court observed that the language of the postponement section might permit a number of successive one-year postponements, but withheld comment. 421 U.S. at 85-86 n.21.

32. The lower court had defined "revision" as a change in a generally applicable requirement; a "postponement" was defined as a change in the application of a requirement to a particular party. 489 F.2d at 401. The Court rejected this distinction because the Amendments required that state implementation plans contain compliance tables, schedules and other very detailed items; revisions could, therefore, be of very specific application. 421 U.S. at 88-89.

33. Under a postponement, an emissions source would still be responsible for compliance with a state requirement within one year. Under an individual variance, compliance might no longer be required and a postponement would be unnecessary.

34. The respondents had also urged that the EPA's interpretation of the revision section invited increased litigation on whether, in each case, a variance would cause violation of the national standards. The Court noted that the agency was unconcerned about potential administrative problems, possibly because evaluations of applications for individual variances were similar to those made when the plans were initially approved. Any litigation, moreover, would be carried out on the polluter's time; during the litigation the original regulations would remain in effect, subjecting the polluter to enforcement proceedings for any violation. These considerations would deter frivolous suits. 421 U.S. at 92.

cern for potential litigants is the scope of the Court's review of EPA determinations. Generally, statutory interpretation is considered within the exclusive competence of the Court, which will construe the language without reference to the agency's prior determination.[35] In cases involving the administration of a complex statute in a highly technical field, however, the Court may defer to the agency's expertise and adopt the agency's reading of the statute, provided it is reasonable.[36] Although the Court's extensive examination of the legislative history and purpose of the Amendments in *Train* appears at first glance to constitute an independent scope of review, the Court's reluctance to endorse the agency's interpretation as the correct, rather than a reasonable, reading[37] indicates the exercise of a more limited scope of review. *Train* may herald the Court's tentative recognition of the EPA's expertise and a willingness to defer to the agency's reasonable interpretation of the Amendments in the future.[38]

The decision also raises a question as to the applicability and effect of the "as expeditiously as practicable" clause.[39] As a consequence of *Train*, a variance granted under the revision section may not be challenged on grounds that it does not permit attainment of the standards as quickly as possible. Presumably, the state has attained the national standards or expects to do so despite the individual variance; in either case, the variance would have no adverse effect upon the state's effort at compliance. NRDC had argued that prior to the attainment date, the "as expeditiously as practicable" clause required the maximum available controls on all sources. A variance of any kind would delay attainment beyond the earliest practicable date; hence variances should not be freely given.[40] The argument applied with equal force to states whose mandatory

35. NLRB v. Hearst Publications, Inc., 322 U.S. 111, 115 (1944) (issue whether newsboys are "employees" within the meaning of the National Labor Relations Act).

36. *E.g.*, Gray v. Powell, 314 U.S. 402 (1941) (agency charged with administration of Bituminous Coal Act may determine who is a "producer" under the Act). *See* Jaffe, *Judicial Review: Question of Law*, 69 HARV. L. REV. 239 (1955); Schwartz, *Gray vs. Powell and the Scope of Review*, 54 MICH. L. REV. 1 (1955).

37. 421 U.S. at 75.

38. *See* International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 650 (D.C. Cir. 1973) (Bazelon, C.J., concurring).

39. 42 U.S.C. § 1857c-5(a)(2)(A)(i) (1970).

40. 412 U.S. at 94-96.

deadline had passed but which had failed to meet the standards.[41] They would still be required to comply as expeditiously as practicable.[42] Yet in de-emphasizing the technology-forcing aspect of the Amendments,[43] the Court may have diluted the statute's urgency with regard to compliance.[44]

Train also demonstrates the Court's view of the federal role in air pollution control under the Amendments. The Court believed the Amendments withdrew the states' former discretion to act to improve the ambient air; the Amendments preserved that discretion, however, with regard to what the states may require of emissions sources, within the parameters of the national standards.[45] As a result of *Train*, individual sources are more likely to request and receive variances, and in this sense the decision affects the entire air quality control effort. The federal agency is to guide the undertaking by setting threshold standards for state participation.[46] The primary responsibility, however, is now clearly on the states.

John Anthony Fries

41. 6. ENV. REP. 305 (June 6, 1975). For most states, the deadline has already passed. *See* note 7 *supra*.

42. 42 U.S.C. § 1857c-5(a)(2)(A)(i) (1970).

43. NRDC had argued that the Amendments were technology-forcing, since attainment of the national standards might require development of new methods and devices for limiting emissions. It would defeat the purpose of the statute, therefore, if sources granted variances were permitted to relax their pursuit of more advanced technology. The Court found, however, that if the national standards were being met there would be no need for additional or more efficient pollution control devices. 421 U.S. at 90-91.

44. The Court acknowledged that the Amendments required compliance as soon as practicable, but did not consider this specific question. 421 U.S. at 77 n.15.

45. The states may enforce limitations designed to achieve a higher level of air quality than approved by the EPA. 42 U.S.C. § 1857d-1 (1970).

46. 421 U.S. at 67, 79.